BANK BUMIPUTRA (M) BHD.

v.

DORIC DEVELOPMENT SDN. BHD. & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 23-204-1986]
16 JUNE 1987

CIVIL PROCEDURE: *Summary Judgment - Order 14 RHC - Appeal to Judge against decision of Senior Assistant Registrar - Leave granted to enter final judgment against borrower and in favour of bank - Overdraft facility - Bank sued company on covenant to pay money so lent and guarantor on guarantee to pay same - Money lent was also secured by charge over land of company - Whether rules of mortgage at Common Law would apply to charge under National Land Code - Order of sale by public auction obtained in earlier originating summons - Question of stay of proceedings - Whether bank to sue principal debtor first before suing guarantor.*

This was an appeal against the decision of the Senior Assistant Registrar granting leave to enter final judgment under O. 14 RHC 1980 against the 1st defendant the Company and the 3rd defendant the Guarantor.

The Bank had earlier sued the Company on a covenant to pay money so lent and owing, and the Guarantor on her guarantee to pay the same. The money so lent was also secured by a charge over certain land of the Company.

Held:
In dismissing the appeals:

[1] A charge is governed by detailed statutory provisions of the National Land Code while an English mortgage at Common law, the mortgaged property was transferred to the name of the mortgagee on the creation of the mortgage with a proviso for redemption. Therefore, the rules of mortgage at Common Law would not apply at all to a charge under the National Land Code.

[2] By Clause 6 of the relevant letter of guarantee, any account stated by the Bank and duly certified by any of the Bank's officers would have to be treated by the Guarantor as conclusive.

[3] It would not be sufficient for the Guarantor to merely say that the account was not supplied and that the Bank would therefore be put to strict proof, for such account could always have been obtained on request to the Bank or from the Company, and putting merely the Bank to strict proof would not amount to a condescension on particulars by the Guarantor when showing cause to an O. 14 RHC application, as after all by averring that the plaintiff be put to strict proof would only amount to a mere denial.

[4] In the absence of any express condition requiring that 'foreclosure proceedings' be proceeded with and completed first before suing the Guarantor, the Bank could not be compelled to sue the principal debtor i.e., the Company first.

[Appeals dismissed with costs.]

Cases referred to:
Khaw Joo Tok & Ors. v. Ng Boo Bee & Ors. [1920] 15 SSLR 183
Bank Bumiputra Malaysia Bhd. v. Esah bt. Abdul Ghani [1985] CLJ (Rep) 41

Legislation referred to:
Rules of the High Court 1980, O.14

For the plaintiff - Ting Hui; M/s. Hong Chew King & Co.
For the defendants - Tony Dhana; M/s. Zain & Co.

JUDGMENT

Peh Swee Chin J:

I have earlier dismissed the appeals of the 1st defendant, (the Company), and the 3rd defendant, (the Guarantor), respectively from a decision of the learned Registrar granting leave to enter final judgment against them in favour of the plaintiff, (the Bank), on an O. 14 application for summary judgment. I now give my reasons.

The Bank has earlier sued the Company for RM6,460,603.74 with interest and costs due on a banking account in respect of which the Bank had granted an overdraft facility. Although this action is not a foreclosure summons, it will be pertinent to point out that the money so lent and so owing was also secured by a charge over certain land of the Company, in addition to its being secured also by a letter of guarantee signed by the Guarantor in favour of the Bank and concerned herein. In this action, therefore the Bank has sued the Company on a covenant to pay money so lent and so owing, and the Guarantor on her guarantee to pay the same.

Before me on appeal, learned Counsel for the Company submitted implicitly on the basis, that the said charge executed by the Company was an English mortgage at common law or a transaction exactly like such an English mortgage. On the said basis, he submitted that the equity of redemption had been lost because of the order of sale by public auction made by the Court. He relied on the case of *Khaw Joo Tok & Ors. v. Ng Boo Bee & Ors.* [1920] 15 SSLR 183, as authority for the proposition that because of the loss of such equity of redemption, the Bank could not sue the Company on a covenant to pay the residue.

In the *Ng Boo Bee* case, certain property was mortgaged, certainly not in the form of a memorandum of charge as under our present National Land Code or its predecessor, the former Land Code of 1926 of the Federated Malay States. The mortgage took the form of and was intended to be, a mortgage as in England at common law. It was held to the effect as follows after the consideration of various English authorities on such mortgage, i.e., that if a mortgagee first proceeded in Court on the covenant to pay against the mortgagor, and obtained part but not complete payment of his debt, he could still foreclose the mortgaged property for the residue or any deficiency; but on the other hand, if the mortgagee foreclosed the property first and then found the proceeds insufficient to pay himself completely, then equity would only permit him to sue mortgagor on the covenant for the residue by requiring the mortgagee to give a right of redemption to the mortgagor but if after foreclosure decree absolute or sale and the mortgaged property had already been sold to a stranger, the mortgagee had put it out of his power to reconvey the same to the mortgagor, equity would not permit the mortgagee to sue the mortgagor on the latter's covenant to pay for the residue or deficiency.

It is necessary to set out the *ratio decidendi* of *Ng Boo Bee* case in order to understand the learned Counsel's submission.

I found the submission to have no substance at all for the following reasons. *a*

In the first place, the premise that a charge under National Land Code is the same as an English mortgage at common law is patently erroneous. A charge is governed by detailed statutory provisions of the National Land Code while an English mortgage at common law was a horse of a different colour altogether. It is not necessary to delve into all the differences between a charge and a mortgage beyond mentioning one or two of such differences. In an English mortgage at common law, the mortgaged property was transferred to the name of the mortgagee on the creation of the mortgage with a proviso for redemption. Under the said proviso, the mortgagee agreed to re-transfer the mortgaged property by a certain date beyond which it was stated to be irredeemable. Equity stepped in and provided the equity of redemption, by which the right to redeem was extended beyond the said date and would be lost only on foreclosure or sale. *b* *c*

The rules of mortgage at common law would therefore not apply at all to a charge under the National Land Code. Even assuming that they were applicable to a charge under the National Land Code for the sake of academic discussion of the objection raised by learned Counsel, *Ng Boon Bee* case would have been clearly distinguishable, because it was common ground in the instant case, that though an order of sale by public auction was made in the earlier originating summons, the charged land had not in fact been sold as yet as at the close of submissions of Counsel, so that the supposed mortgagee i.e., the Bank would still have been able to give a right of redemption of the property in question on payment of the sum due. In other words the Bank had not made it impossible for the land in question to be restored to the Company on payment of the sum due. *d*

I have used the expression "at common law" rather pointedly when referring to the mortgage, because the common law applicable to a mortgage was materially changed by the Law of Property Act 1925 of England. *e*

Arguing for the Guarantor, learned Counsel submitted that no account for the money due was supplied, and the Bank was therefore put to strict proof. Leave should be granted for the case to go for trial.

The short answer was that by Clause 6 of the relevant letter of guarantee, any account stated by the Bank and duly certified by any of the Bank's officers would have to be treated by the Guarantor as conclusive. The affidavit of the Bank's Manager, (encl. 8), stating the sum with interest thereon, would be within Clause 6 aforesaid. Quite apart from the Clause 6, it would not be sufficient for the Guarantor to merely say that the account was not supplied and that the Bank would therefore be put to strict proof, for such account could always have been obtained on request to the Bank or from the Company, and putting merely the Bank to strict proof would not amount to a condescension on particulars by the Guarantor when showing cause to an O. 14 application, as after all by averring that the plaintiff be put to strict proof would only amount to a mere denial. *f* *g*

Lastly it was submitted that the proceedings herein should be stayed because of the order of sale by public auction obtained in the earlier originating summons, but Counsel did not give reasons for this submission, but on looking at his client's affidavit it would appear to be based on the points raised therein to the effect that due to 'double recovery' by the Bank, the present action was not maintainable. The Federal Court's decision in *Bank Bumiputra Malaysia Berhad v. Esah bt Abdul Ghani* [1985] CLJ (Rep) 41, has made it abundantly clear, that, for the purpose of the instant case, in the absence of any express condition requiring that 'foreclosure proceedings' be proceeded with and completed first *h* *i*

before suing the Guarantor, the Bank could not be compelled to sue the principal debtor i.e., the Company first. Such being the case, Counsel's submission that *Esah bt Abdul Ghani* case was distinguishable from the instant case because of foreclosure proceedings not being proceeded with therein at all, could not possibly achieve the desired result intended by Counsel.

I therefore dismissed the appeals of both the Company, (1st defendant) and Guarantor, (3rd defendant) with costs.

Also found at [1988] 1 CLJ 311